U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street - Suite 900
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

**Issue date: 03Apr2001**

Case No: 2000-BLA-311

In the Matter of

WOODROW BRINKLEY

Claimant

v.

PEABODY COAL COMPANY

Employer

OLD REPUBLIC INSURANCE COMPANY

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Sandra M. Fogel, Esq.
CULLEY & WISSORE
Raleigh, Illinois
For Claimant

Richard H. Risse, Esq.
WHITE & RISSE, L.L.P.
St. Louis, Missouri
For the Employer/Carrier

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER – DENYING MODIFICATION

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On January 5, 2000, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Carbondale, Illinois on November 28, 2000. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX", "EX", and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES[1]

[1] On January 19, 2001, amendments to the Black Lung Regulations at Title 20 of the Code of Federal Regulations became effective. On February 9, 2001, the United States District Court for the District of Columbia entered a Preliminary Injunction Order staying adjudication of all claims pending before the Office of Administrative Law Judges, "except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in the instant lawsuit will not affect the outcome of the case." *National Mining Association v. Elaine Chao, Secretary of Labor, et al.,* No. 1:CVO3086(EGS) (Feb. 9, 2001, D.C. Cir.). In accordance with the preliminary injunction, an Order was issued by the undersigned on February 28, 2001, affording the parties the opportunity to brief their respective positions regarding the effect of the new regulations on the outcome of this claim. The District Director and Employer submitted position briefs. Upon reviewing this claim, I have determined that the

1. Whether the evidence establishes a change in conditions or a mistake in a determination of fact pursuant to Section 725.310;

2. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

3. Whether Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether Claimant is totally disabled;

5. Whether Claimant's disability is due to pneumoconiosis;

6. Whether Illinois Black Lung Benefits are to be used as an offset against any awarded federal benefits; and

7. Whether Employer’s Exhibits 11, 12, 13, 14, 16, 17, 18, and 19, are admissible into evidence.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Factual Background and Procedural History

Claimant, Woodrow Brinkley, was born on April 29, 1915, and died on August 24, 1995. He had completed seven years of formal education. Claimant married Helen Brinkley on November 14, 1937, and remained married until his death. They had one dependent child, William Robert Brinkley, born August 19, 1956, a student at the time this claim was originally filed.

At the time his claim was filed, Mr. Brinkley complained of shortness of breath and fatigue. (DX 01) He testified on May 29, 1984 that he had smoked cigarettes at a rate of one package per day from 1937 until 1984 for a total of forty-seven years. This history is reported fairly consistently throughout his

---

amended Title 20 Black Lung Regulations will not affect the outcome of this case. Accordingly, adjudication may continue.

medical record. Accordingly, I find that Mr. Brinkley smoked one package of cigarettes for forty-seven years, until 1984.

This claim has a protracted procedural history. Claimant filed his application for black lung benefits on March 6, 1978. The Office of Workers' Compensation Programs awarded benefits on November 12, 1980. The claim has been through various appeals to the Benefits Review Board and the Seventh Circuit Court of Appeals.
The last action in this claim was an award of benefits followed by a request for modification by the Employer. On September 29, 1999, the Employer submitted further evidence in support of modification.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. In a Joint Stipulation of Evidence and at the hearing, the parties stipulated that Claimant worked ten years in qualifying coal mine work. (Tr. 16) Based upon my review of the record, I accept the stipulation as accurate and credit Claimant with ten years of coal mine employment.

Mr. Brinkley was employed by Peabody Coal Company as a night watchman. (EX 04) He testified that although he was classified as a night watchman, he was required to do "whatever they needed me to do." (EX 04) The duration of his employment was aboveground in a strip mine. Mr. Brinkley stopped working on May 31, 1977.

State Worker's Compensation Award

The record indicates that Mr. Brinkley received an award for Black Lung Benefits from the State of Illinois. (Tr. 17, EX 15) A duly executed settlement of a state workers' compensation pneumoconiosis claim does not bar the claim for federal black lung benefits. *Honaker v. Jewell Ridge Coal Corp.*, 2 BLR 1-947, 1-949 (1980); *McCarty v. Clinchfield Coal Co.*, 1 BLR 1-914, 1-915 (1978); *Hileman v. Clinchfield Coal Co.*, 1 BLR 1-531, 1-533-34 (1978); *Murphy v. Q and G Coal Co.*, 1 BLR 1-455, 1-459-460 (1978). However, the amount of the settlement or state award for disability due to pneumoconiosis will be applied to offset the federal black lung benefit. *Couch v. Shamrock Coal Co.*, 2 BLR 1-342 (1979). Any federal benefits granted in this claim will be offset by the state award.

Claimant's Objections to Employers Exhibits

At the hearing, Claimant objected to the introduction of Employer's Exhibits 11, 12, 13, 14, 16, 17, 18, and 19, asserting that these exhibits "should have and could have been developed in the original claim," and that the Employer's physicians are reviewing evidence that existed or was ascertainable at the time of the previous hearings. (Tr. 13, 14) Employer Exhibits 11, 12, 13, and 14 are independent medical reviews from Drs. Tuteur, Dahhan, Repsher and Fino respectively. Employer Exhibits 16, 17, 18, and 19 are depositions of Drs. Tuteur, Fino, Wiot, and Repsher.

In deciding whether a case should be reopened, the reviewer must balance the need to render justice under the Act against the need for finality in decision making. *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23 (1st Cir. 1982). In terms of considering the discretionary nature of the modification process, the essential criteria is whether a reopening will render justice under the Act. *Id*.

In reviewing the evidence to determine a change in conditions, it is proper for me to refuse to consider evidence in existence at the time of the first award of benefits. *See, Cline v. Westmoreland Coal Co.,* 21 B.L.R. 1-69 (1997). The evidence submitted by the Employer consists of medical reviews and depositions. (See, EX 11, 12, 13, 14, 16, 17, 18, and 19) The reports are based upon hospital and medical reports dating from 1978 to 1994, and pulmonary function and arterial blood gas studies dating from 1978 to 1992. The previous hearing was in 1985, and much of the medical evidence discussed in these medical reports and depositions was developed after the 1985 hearing. At issue in this modification request is Mr. Brinkley's medical condition between the hearing in 1985 and his death in 1995. The evidence regarding Mr. Brinkley's medical condition after 1985 was not, nor could it have been, developed prior to the 1985 hearing. Since this evidence was not in existence at the time of the 1985 hearing, I find that reopening this case and admitting the evidence contained in Employer's Exhibits 11, 12, 13, 14, 16, 17, 18, and 19, renders justice under the Act. Accordingly, Claimant's objections are hereby OVERRULED. Employer's Exhibits 11, 12, 13, 14, 16, 17, 18, and 19 are hereby received into evidence.

## MEDICAL EVIDENCE[2]

### X-ray reports

| Exhibit | Date of X-ray | Date of Reading | Physician/ Qualifications | Interpretation |
|---|---|---|---|---|
| DX 34 | 02-25-92 | 06-29-96 | Wiot / BCR, B | Negative |
| DX 34 | 10-31-94 | 06-29-96 | Wiot / BCR, B | Negative |
| DX 34 | 04-06-93 | 06-29-96 | Wiot / BCR, B | Negative |
| EX 13 | 04-06-93 | 05-17-00 | Repsher / B | Negative |
| EX 13 | 10-31-94 | 05-17-00 | Repsher / B | Negative |
| EX 13 | 02-25-92 | 05-17-00 | Repsher / B | Negative |

"B" denotes a "B" reader and "BCR" denotes a board-certified radiologist. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. See 20 C.F.R. § 718.202(a)(ii)(C). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

### Pulmonary Function Studies

| Exhibit/ Date | Physician | Age/ Height | $FEV_1$ | FVC | MVV | $FEV_1$/ FVC | Tracings | Comments |
|---|---|---|---|---|---|---|---|---|
| EX 10 06-27-85 | Sanjabi | 70 / 72 | 1.07 | 3.14 | 48 | 34 | Yes | |
| | | | 1.54* | 3.70* | 38* | 42* | | |

*post-bronchodilator values

### Arterial Blood Gas Studies

[2] Only medical evidence submitted subsequent to the October 16, 1985 award of benefits, is summarized herein. All other evidence was summarized in Judge Gilday's October 16, 1985 opinion and is incorporated herein.

| Exhibit | Date | $pCO_2$ | $pO_2$ | Resting/ Exercise |
|---|---|---|---|---|
| EX 10 | 06-27-85 | 38 | 69 | Resting |

Medical Examination Reports

Mr. Brinkley was examined on May 15, 1985 by Parviz B. Sanjabi, M.D. (EX 09) Dr. Sanjabi incorporated the findings from his previous reports with regards to coal mine employment and smoking history. He diagnosed Claimant with chronic obstructive pulmonary disease, but provided no etiology. He opined that there was an insufficient amount of pathology in the x-rays to consider coal workers' pneumoconiosis. Dr. Sanjabi's credentials are not of record.

Independent Medical Reviews

An independent medical review dated May 5, 2000, was submitted by Peter G. Tuteur, M.D. (EX 11) Dr. Tuteur reviewed x-rays, pulmonary function and arterial blood gas studies, examination reports and Mr. Brinkley's death certificate. He opined that pulmonary function studies performed on March 27, 1980, December 14, 1984, and June 27, 1985, were invalid due to poor effort, and that studies performed on September 18, 1989, and November 17, 1992, were not reliable as they only contained one tracing. He noted an eleven year aboveground coal mine history and a smoking history of one package of cigarettes per day for forty-seven years. He diagnosed Claimant with chronic obstructive pulmonary disease induced by cigarette smoke, and opined that he had no clinically significant, physiologically significant, or radiographically significant coal workers' pneumoconiosis. He further opined that Mr. Brinkley had a moderate obstructive ventilatory defect and was totally disabled at the time he retired.

After reviewing the other medical reviews submitted in this case, Dr. Tuteur was deposed on October 10, 2000. (EX 16) His opinions and diagnoses were consistent with those expressed in his medical review. Dr. Tuteur is Board Certified in Internal Medicine and Pulmonary Disease.

Abdul Kader Dahhan, M.D., submitted an independent medical review dated May 9, 2000. (EX 12) Upon reviewing x-rays,

pulmonary function and arterial blood gas studies, examination reports, and an EKG, and noting an eleven year aboveground coal mine history and a smoking history of one package of cigarettes per day for fifty-eight years, Dr. Dahhan found insufficient objective data to justify a diagnosis of coal workers' pneumoconiosis. He diagnosed Mr. Brinkley with chronic obstructive lung disease and heart disease. He found pulmonary function studies performed on June 21, 1978 and March 27, 1980, to be invalid, and did not opine with regards to disability. Dr. Dahhan is Board Certified in Internal Medicine and Pulmonary Disease.

Lawrence Repsher, M.D., submitted an independent medical review dated May 16, 2000, in which he reviewed x-rays, pulmonary function and arterial blood gas studies, and four examination reports, and noting an eleven year aboveground coal mine history and a smoking history of one package of cigarettes per day for forty-seven years. (EX 13) Dr. Repsher diagnosed Mr. Brinkley with mild to moderate chronic obstructive pulmonary disease, opining that he did not have coal workers' pneumoconiosis. He further opined that Mr. Brinkley was totally disabled prior to his death.

Dr. Repsher was deposed on December 1, 2000, after reviewing the independent medical reviews submitted by other physicians. (EX 19) His opinions and comments were consistent with his medical review. He added to his opinion, however, that the only pulmonary function study that was "even reasonably interpretable" was performed on July 9, 1980, noting that the rest were "bad data." Dr. Repsher is a highly qualified pulmonary specialist with Board Certifications in Internal Medicine and Pulmonary Disease.

An independent medical review was submitted by Gregory J. Fino, M.D., dated May 16, 2000. (EX 14) Dr. Fino reviewed x-rays, pulmonary function and arterial blood gas studies, and four examination reports. He cites to findings of other physicians but does not list the coal mine history or smoking history that he based his opinion upon. Dr. Fino opined that there was insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. He did opine that Mr. Brinkley had an obstructive defect and was totally disabled from a respiratory standpoint prior to his death. Dr. Fino evaluated the pulmonary function study results produced by Mr. Brinkley, and noted that all studies performed prior to June 27, 1985 were invalid due to poor effort, relying on the June 27,

1985, September 18, 1989, November 20, 1989, and November 17, 1992, studies to diagnose the obstructive defect.

Dr. Fino was deposed on November 2, 2000. (EX 17) His opinions expressed were consistent with those expressed in his medical review. Dr. Fino is Board Certified in Internal Medicine and Pulmonary Disease.

## DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits before March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 727. If I find the evidence insufficient to establish entitlement to benefits, I must consider entitlement under 20 C.F.R. Part 718 pursuant to §727.203(d).

### Modification

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Act by 30 U.S.C. § 932(a) and as implemented by 20 C.F.R. § 725.310, provides that upon a miner's own initiative, or upon the request of a party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. 20 C.F.R. § 725.310(a). Section 22 of the Longshore Act is to be given a broad interpretation. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). I must also consider whether reopening this case to correct a mistake in a determination of fact at this stage of the proceedings would render justice under the Act. *See O'Keeffe v. Aerojet-General Shipyards,* 404 U.S. 254, 255-56 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *Branham v. Bethenergy Mines, Inc.[Branham II]*, 21 BLR 1-79 (1998).

Similarly, the language of 20 C.F.R. § 725.310 is permissive rather than mandatory. *Motichak v. Beth Energy Mines, Inc.*, 17 BLR 1-15 (1992). The statute vests the fact-finder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further

reflection on the evidence initially submitted." *O'Keeffe, supra; Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). Demonstrating a mistake in a determination of fact does not require submission of new evidence, whereas establishing a change in conditions does require new evidence. *Eifler v. Director, OWCP*, 926 F.2d 663 (7th Cir. 1991); *Cole v. Director, OWCP*, 13 BLR 1-60 (1989); *Wojtowicz, supra.*

Change in Conditions

The Benefits Review Board has narrowly interpreted the meaning of a "change in conditions" to include only those physical changes that occurred between the time of the decision and the time of request for modification. *See, Rizzi v. The Four Boro Contracting Corp.*, 1 BRBS 130, BRB 74-138 (1971). The Administrative Law Judge is obligated to perform an independent assessment of the newly submitted evidence, and consider it in conjunction with the previously submitted evidence. *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *See also, Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Drs. Dahhan, Fino, Repsher, and Sanjabi, opine that there is insufficient evidence to justify a finding of pneumoconiosis. Dr. Tuteur found Mr. Brinkley did not have clinically significant, physiologically significant, or radiographically significant pneumoconiosis. In *Mooney v. Peabody Coal Co.*, BRB 93-1507 B.L.A. (Oct. 30, 1996) the Benefits Review Board deferred to the Administrative Law Judge's reasonable interpretation that "Dr. Tuteur's diagnosis of no 'significant' coal worker's pneumoconiosis, was a finding of 'insignificant' coal worker's pneumoconiosis, which was a positive finding of pneumoconiosis. I find Dr. Tuteur's opinion to be positive for pneumoconiosis. Further, all physicians opining as to impairment found Claimant totally disabled from a respiratory standpoint.

It has been determined in previous hearings and opinions by both Administrative Law Judges and the Benefits Review Board, that Mr. Brinkley was totally disabled due to pneumoconiosis, pursuant to the presumptions at §727.203, which the Employer did not successfully rebut. I have considered the Administrative Law Judge, BRB, and Circuit Court opinions to the extent that they address the question of the presence of pneumoconiosis. I

fully concur with the conclusion that the Claimant has established pneumoconiosis. It has long been held that pneumoconiosis is a progressive and irreversible disease. *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir., 1997). As such, I give little weight to the opinions of physicians who now opine that Mr. Brinkley did not have pneumoconiosis, or was not totally disabled by it. Accordingly, in reviewing the newly submitted evidence in conjunction with the old, I find no change in Mr. Brinkley's physical condition sufficient for a grant of modification to the Employer.

Mistake in a Determination of Fact

I must consider whether reopening this case to correct a mistake in a determination of fact at this stage of the proceedings would render justice under the Act. See *O'Keeffe , supra*; *Banks, supra*; *General Dynamics Corp., supra*; *Branham , supra*. While a change in conditions has been construed narrowly, a mistake in a determination of fact has been construed broadly as a basis for modification. The authority to reopen proceedings is generally not limited to any particular type of facts, however, facts are typically the subject of modification proceedings. *Allen v. Strachen Shipping Company and Sealand Service, Inc.*, 11 BRBS 86, BRB 79-276 (1980); *Steele v. Associated Banning Company*, 7 BRBS 501, BRB 77-177 (1978). The United States Supreme Court, in *O'Keefe, supra*, has indicated that all evidence of record should be reviewed in determining whether "a mistake in a determination of fact" has made and stated that, under modification, the fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." This case has been pending since 1978. Benefits have been awarded to the miner on a repeated basis. I will review the evidence of record for a mistake in a determination of fact.

Interim Presumptions

20 C.F.R. §727.203(a) provides in pertinent part that a miner who engaged in coal mine employment for at least ten years will be presumed to be totally disabled due to pneumoconiosis if they meet at least one of four medical requirements. I have found Mr. Brinkley to have ten years of coal mine employment, thereby entitling him to the presumption, provided he meets the

medical requirements. The first alternative medical requirement is §727.203(a)(1), providing that the presumption applies if a chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis. In this case, there is no biopsy or autopsy evidence. Additionally there were twenty-seven readings of seven chest x-rays.

In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Of the twenty-seven interpretations, two were positive for pneumoconiosis. Every dually qualified physician found the x-ray evidence negative. Because the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence fails to invoke the presumption under 20 C.F.R. §727.203(a)(1).

20 C.F.R. §727.203(a)(2) provides for applicability of the presumption if ventilatory studies establish the presence of a chronic respiratory or pulmonary disease as demonstrated by values equal to or below those specified in the regulations. Mr. Brinkley produced qualifying results on pulmonary function studies dated June 21, 1978, March 27, 1980, December 14, 1984, and June 27, 1985. These studies have been uniformly criticized by highly qualified physicians as not expressive of Claimant's maximum effort. The technicians administering the studies noted generally good cooperation and effort, but without the qualifications of the administering technician to bolster the qualifying results, I find that the presumption is not invoked pursuant to 20 C.F.R. §727.203(a)(2).

20 C.F.R. §727.203(a)(3) provides for invocation of the presumption upon production of blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood. Mr. Brinkley did not produce a qualifying arterial blood gas study, and therefore the presumption is not invoked under 20 C.F.R. §727.203(a)(3).

20 C.F.R. §727.203(a)(4) provides for invocation of the presumption upon the introduction of other medical evidence,

including the documented opinion of a physician exercising reasoned medical judgment establishing the presence of a totally disabling respiratory or pulmonary impairment. In this case, each and every physician opining as to the level of Mr. Brinkley's respiratory or pulmonary impairment found him to be totally disabled. Therefore, I find the presumption that Mr. Brinkley was totally disabled due to pneumoconiosis invoked pursuant to 20 C.F.R. §727.203(a)(4).

Rebuttal of 20 C.F.R. §727.203(a) Presumption

The presumption of total disability due to pneumoconiosis found at 20 C.F.R. §727.203(a) can be rebutted in one of four ways as provided in 20 C.F.R. §727.203(b). Pursuant to 20 C.F.R. §727.203(b)(1) the presumption is rebutted if the evidence establishes that Mr. Brinkley is in fact performing his usual coal mine work or comparable work. As Mr. Brinkley is now deceased, this provision is inapplicable.

20 C.F.R. §727.203(b)(2) provides for rebuttal if it is established that the miner is able to do his usual coal mine work or comparable work. All physicians opining as to disability found him totally disabled prior to his death, and as Mr. Brinkley is now deceased this provision is inapplicable.

20 C.F.R. §727.203(b)(3) provides for rebuttal if the medical evidence establishes that the miner's disability or death did not arise out of his coal mine employment. At the time he submitted his medical report. Dr. Hauptman had been treating Mr. Brinkley for over a year. (DX 23) He diagnosed Mr. Brinkley with chronic obstructive lung disease due to coal workers' pneumoconiosis.

Dr. Fino attributed Mr. Brinkley's obstructive impairment entirely to exposure to cigarette smoke. In his medical report, Dr. Fino stated that a consulting physician is as qualified to render an opinion on the level of impairment as a treating or examining physician. He stated, "The quality of an opinion by a treating doctor or an examining doctor or consultant on the question of impairment depends upon the special training, skill, and expertise of the doctor *and* the availability of objective tests of lung function that can be validated according to published standards by a qualified pulmonary physician." (EX 14, emphasis added) He went on to opine that pneumoconiosis can not be ruled out just by a negative x-ray, but that spirometry can tell the etiology, nature, and severity of an impairment.

In this case, we have four highly qualified pulmonary physicians who opine in various combinations to the invalidity of each and every pulmonary function study performed. Dr. Repsher states that only one study is even remotely interpretable, calling the rest "bad data." I find that Dr. Fino lacks the objective data "validated according to published standards" to render an opinion regarding impairment that is equal to that of a treating or examining physician, entitling his opinion to diminished weight. *Mabe v. Bishop Coal Co.*, 9 B.L.R. 1-67 (1986).

Further, Dr. Fino stated that "it is well known that surface miners do not really get obstruction due to coal mine dust inhalation as we talk about in terms of chronic obstructive lung disease," and that there is "no good clinical evidence that inhalation of coal dust causes obstruction." The Board has held that a judge may discredit the opinion of a physician whose medical assumptions are contrary to, or in conflict with, the spirit and purposes of the Act. *Wetherill v. Green Construction Co.*, 5 B.L.R. 1-248, 1-252 (1982). Differences may exist within the medical community as to the etiology of obstructive lung disease. However, courts have determined that obstructive lung disease can result from coal dust inhalation. *See, Blakley v. Amax Coal Co.*, 54 F.3d 1313 (7th Cir. 1995); *Freeman United Coal Co. v. OWCP*, 957 F.2d 302, 303 (7th Cir. 1992); *Lemmons & Co., Inc. v. OWCP,* 43 F.3d 1474 (7th Cir. 1995); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 591 (7th Cir. 1985); *Mitchell v. OWCP*, 25 F.3d 500 (7th Cir. 1994). I find Dr. Fino's opinion to be contrary to the Act and regulations and therefore entitled to no weight.

Dr. Repsher attributed Mr. Brinkley's impairment entirely to heart disease. He opined that coal dust, in the absence of complicated pneumoconiosis does not produce clinically significant obstructive disease. Again, I find this opinion contrary to the Act and regulations and accord it no weight. *Id.*

Dr. Dahhan opined that Mr. Brinkley had chronic obstructive lung disease of the variety of chronic bronchitis due to a lengthy smoking history. His opinion sets forth the clinical findings, observations, facts, and other data upon which he based his diagnosis, making his opinion well documented and reasoned. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Dr. Dahhan did not treat nor examine Mr. Brinkley at any time and I choose to give his opinion less weight than that

of an examining or treating physician whose opinions are also well documented and reasoned. *Szafraniec v. Director, OWCP*, 7 B.L.R. 1-397 (1984).

Dr. Tuteur found cigarette induced chronic obstructive pulmonary disease induced by cigarette smoke exposure. He diagnosed cigarette smoke as an etiology of the obstruction because the pulmonary function studies showed obstruction and, "one expects restriction, not obstruction" with pneumoconiosis. An expectation of restriction is not contrary to the Act and regulations. Dr. Tuteur set forth the clinical findings, observations, facts, and other data upon which he based his diagnosis, making his opinion well documented and reasoned. *Fields, supra.* Dr. Tuteur did not treat nor examine Mr. Brinkley at any time, entitling his opinion to less weight than that of an examining or treating physician whose opinions are also well documented and reasoned. *Szafraniec, supra.*

Dr. Sanjabi's newly submitted examination report diagnoses Mr. Brinkley with chronic obstructive pulmonary disease, but provides no etiology. Since legal pneumoconiosis includes any chronic lung disease or impairment arising out of coal mine employment, his diagnosis of an obstructive impairment without an etiology is equivocal. An equivocal opinion regarding etiology is entitled to diminished weight. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

In evaluating the medical evidence, I am faced with the opinion of Claimant's physician who, at the time of his report, had been treating Mr. Brinkley for over a year, and had firsthand knowledge as to his symptoms. The record also contains the opinions of four highly qualified pulmonologists, two of whom opine contrary to the Act. These physicians opine as to Claimant's impairment, based upon reports of symptoms and pulmonary function studies which they criticize as invalid. I give greater weight to the firsthand knowledge and extended treatment record of Mr. Brinkley's treating physician and find that the medical evidence fails to establish that the miner's disability did not arise from his coal mine employment. Therefore, the presumption is not rebutted pursuant to 20 C.F.R. §727.203(b)(3).

20 C.F.R. §727.203(b)(4) provides for rebuttal of the presumption if the medical evidence establishes that the miner did not have pneumoconiosis. Dr. Hauptman found that Mr.

Brinkley did have coal workers' pneumoconiosis. Dr. Tuteur found that Mr. Brinkley did not have clinically significant, physiologically significant, or radiographically significant pneumoconiosis. As discussed above, I find this to be a positive diagnosis for pneumoconiosis.

Drs. Dahhan, Fino, Repsher, and Sanjabi opined that there was insufficient evidence to justify a diagnosis of pneumoconiosis. As discussed above, Drs. Fino and Repsher's opinions are contrary to the Act and regulations, and are entitled to no weight.

In weighing the evidence, I am faced with non-qualifying pulmonary function and arterial blood gas studies, negative x-ray readings and the opinions of Claimant's treating physician, Dr. Hauptman, opining to the presence of pneumoconiosis, bolstered by Dr. Tuteur's positive finding of pneumoconiosis. I assign the greatest weight to the opinion of the treating physician, who had firsthand knowledge of Claimant's condition and treatment for the period of approximately one year. Dr. Sanjabi examined Mr. Brinkley, thus according him firsthand knowledge of his condition. However, I find that Dr. Hauptman was likely to be more familiar with Mr. Brinkley's condition due to his status as treating physician. ***Onderko v. Director, OWCP***, 14 B.L.R. 1-2 (1989). In weighing all of the medical evidence, I find that the presumption is not rebutted pursuant to 20 C.F.R. §727.203(b)(4).

## ORDER

In light of the foregoing, I find that Mr. Brinkley is entitled to the presumption provided in 20 C.F.R. §727.203(a). I further find that Employer has failed to rebut this presumption as provided in 20 C.F.R. §727.203(b). Accordingly, It is ordered that Employer's request for modification is hereby **DENIED**.

A
Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to

the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.